IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/03/2004

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THE HON'BLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.179 OF 1993

Ismailkhan Gori Vagaiyara
Rajapalayam rep. by

1. M.U.Mohammed Ibrahim

2. Ibrahim Khan Durai .. Appellants

-Vs-

1. The Secretary
Tamil Nadu Wakf Board,
No.3, Santhome High Road
Madras-6

2. The Commissioner,
Rajapalayam Municipality
Rajapalayam .. Respondents

This second appeal is preferred under Section 100 of CPC against the judgment and decree dated 26.4.1990 made in AS No.63 of 1989 on the file of the learned Subordinate Judge, Srivilliputhur reversing the judgment and decree dated 5.7.1989 made in OS No.88 of 1984 on the file of the learned District Munsif, Srivilliputhur.

!For Appellants : Mr.K. Rajkumar

^For Respondents : Mr.A.S.Kaizer for R1

:JUDGMENT

Challenging the judgment of the learned Subordinate Judge, Srivilliputhur made in AS No.63 of 1989, wherein the judgment of the learned District Munsif, Srivilliputhur granting decree in favour of the plaintiffs in a suit for declaratory relief was reversed.
2. Necessary facts for the disposal of this second appeal can shortly be stated thus:

The suit property described in B schedule is a private property belonged to Gori family vagaiyara from the time immemorial. Trees were planted and stone platforms were erected there to meet the outsiders and boundaries were also marked by planting stones all around, on which it is inlaid in letters "Thaikkal Pattani Doraimarkal elkai". By document dated 18.12.1907, one of the heirs of late Ismail Khan Gori by name Mohideen Khan Gori has gifted his 1/3rd share to his sons by a registered gift deed. The suit property was used for the above said purpose till 1927. In 1927, in one portion, thatched building was erected and wrestling arena was created and in the year 1942, a portion of the property was leased out to the second defendant Municipality on rental basis and it continued to pay rental till 1982. Pursuant to a communication by the Wakf Board first defendant, the second defendant stopped the payment of rental. The Wakf Board has notified the suit property as Mela Thaikala Moharum Chavadi Wakf property and published in the Tamil Nadu Gazette on 7.4.1982. It is a private property and not to the Wakf Board and such a notification dated 7.4.1982 and published in Gazette was invalid and illegal. Hence, there arose a necessity for filing the suit.

3. The said suit was resisted by the first defendant stating that it is admitted in the plaint that the Gazette notification under Section 5(2) of the Wakf Act informing the public and persons interested that the suit B schedule property is the Wakf property and the same was published on 7.4.1982; that the said gazette notification was made after due enquiry; that the suit property is a private property is a false one; that the plaint does not disclose as to the year in which B schedule property was occupied by the plaintiffs' ancestors and when the trees and platforms were erected in the suit B schedule property; that the said B schedule property is not one of the properties dealt with under the gift deed dated 18.12.1907; that the Wakf is known as Melathaikal Muharam Chavadi or in short Melathaikkal; that the plaintiffs had neither title nor exclusive possession of the suit B schedule property, and hence, the suit was to be dismissed.

4. The trial court framed necessary issues, tried the suit and granted the relief in favour of the plaintiffs. Aggrieved, the first defendant took it on appeal, wherein the judgment of the trial court was reversed by the learned Subordinate Judge, Srivilliputhur. Aggrieved, the plaintiffs have brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) Whether the lower appellate Court is right in setting aside the judgment of the trial court in as much as no notice was issued to the aggrieved parties and no enquiry was conducted by the Wakf Board, before issuing the impugned notification as required under the provisions of the Wakf Act, 1954?

2) Whether in law the lower appellate Court is right in allowing the appeal without framing the points for determination as required under O.41 Rule 31 C.P.C.?

6. This Court has paid its full attention on the rival submissions and made a thorough scrutiny of the materials available.

7. This Court is of the considered opinion that the judgment of the first appellate court has got to be necessarily set aside. The suit was filed by the plaintiffs seeking declaration that the notification dated 7.4.1982 published by the first defendant Wakf Board in respect of the suit mentioned

properties was invalid and for consequential injunction that by way of permanent injunction they should be restrained from taking any steps pursuant to the said notification on the allegation that the suit mentioned immovable property in B schedule attached to the plaint belonged to Gori family from the time immemorial; that it has been put to use by them personally; that the property was kept under their possession by planting stones all around; that it is also written in letters "Thaikkal Pattani Doraimarkal elkai"; that till 1927, the property was being used for the said purpose as found in the document dated 18.12.1907; that in 1927, in one portion, thatched building was erected and wrestling arena was created and in the year 1942, a portion of the property was leased out to the second defendant Municipality on rental basis and it continued to pay rental till 1982; that pursuant to a communication by the Wakf Board/first defendant, the second defendant stopped the payment of rental; that the plaintiffs, on coming to know about the same, caused notice to the defendants on 14.12.1981; that the first defendant did not issue any reply; that the Wakf Board has notified the suit property as Mela Thaikala Moharum Chavadi Wakf property and published in the Tamil Nadu Gazette on 7.4.1982; that it is a private property and not to the Wakf Board and such a notification was invalid and illegal.

8. The suit was resisted by the first defendant alone and the second defendant remained exparte. The first defendant Wakf Board in its defence plea stated that the property is not a private property; that it belonged to the Wakf and a notification was made in the Gazette after due enquiry; that the case of the plaintiffs that it belonged to Gori family and the family members and the descendants have been enjoying the same all along are false; that the property is called as Mela Thaikala Moharum Chavadi; that the plaintiff have leased out the property to the second defendant Municipality in the year 1942 and the Municipality has been paying rental; that the said lease agreement was invalid and illegal; that on coming to know that the plaintiffs without any right whatsoever have collected the rental from the Municipality, a communication was sent by the first defendant to the second defendant to stop the payment; that accordingly, the Municipality has stopped the payment, and hence, the suit was to be dismissed.

9. In the instant case, the plaintiffs have sought the relief of declaration that the notification issued by the first defendant Wakf Board on 7.4.1982, published and marked as Ex.A.38 is invalid and for consequential permanent injunction. What are all required to be decided in the instant case was whether the said notification under Ex.A.38 issued by the first defendant could be legally sustained. The Court has to answer in negative. The case of the plaintiffs was that the suit mentioned B schedule property is a private property and belonged to their family. The trial court has pointed out that Exs.A.2 and A.3 dated 21.6.1935 and 30.10.1962 respectively would indicate that the suit property was a private property. On the contrary, in order to show that there was any trust created or the property belonged to Wakf, no material was placed before the trial court. Before issuing the notification under challenge, no notice was either issued or served on the plaintiffs. The trial court has pointed out that D.W.1, who was examined on the side of the Wakf Board, has categorically admitted that he had not enquired anybody and he had no knowledge whether anybody was enquired before notification. The Inspector of the Wakf Board, during whose period the proceedings took place, was not examined. Not even a file pertaining to the said notification was

filed before the trial court. Had it been true that the property was one belonged to Wakf, there could not be any impediment for declaring so when the Act of 1954 came into force. Even after the amendment that was made in 196 8, which was intended to include the properties in the Wakf, which were originally omitted to be done, this property was neither included nor notified so.

10. Quite evident it is that the first defendant, without notice or proper enquiry, has issued notification under challenge, which would be repugnant to the provisions of the Wakf Act, and hence, there cannot be any legal impediment in granting declaration that the notification under Ex.A.38 is invalid in law. The trial court, on a thorough discussion of the materials available, has taken a correct view, but the reversal judgment by the first appellate court was an outcome of non appreciation. Hence, without any hesitation whatsoever, the judgment of the first appellate court has got to be set aside. Accordingly, the judgment of the first appellate court is set aside. The judgment of the trial court is restored.

11. In the result, this second appeal is allowed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes
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To
1. The District Munsif, Srivilliputhur
2. The Subordinate Judge, Srivilliputhur
3. The Record Keeper, VR Section,
High Court, Madras

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